



**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**

IN THE MATTER OF:

Grand Pier Center, LLC

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CERCLA 106(b) Petition No. 04-01

**RESPONDENT'S COMMENTS UPON
ENVIRONMENTAL APPEALS BOARD PRELIMINARY DECISION**

In accordance with the United States Environmental Appeals Board (the "Board") Order dated August 18, 2005, Respondent, U.S. EPA, Region 5 respectfully offers the following comments upon the Preliminary Decision.

I. Grand Pier Asserted it was not a CERCLA 107(a) "Operator."

The opening paragraph of the Board's Preliminary Decision explains that "Grand Pier's petition focuses on the scope of liability of a present owner under CERCLA Section 107(a)." U.S. EPA, Region 5 agrees that is a correct statement. In its Petition, however, at pages 6-7, C. Grounds for Reimbursement, paragraph 20 a. and b., Grand Pier explicitly asserted that it was "never" the operator of the off-site sidewalk area. Also, in the Preliminary Decision, at pages 20-21, in I. Background, C. Procedural History, the Board states that Grand Pier argues "...because it is not an owner of the 'off-site sidewalk area' it was not liable" This procedural discussion should also reflect that Grand Pier's Petition expressly asserted it was not an operator of the off-site sidewalk area. Had U.S. EPA, Region 5 declined to respond to Grand Pier's assertion that it was not an operator, the Board or any reviewing court, may not have looked favorably upon the

Region if it later chose to answer the Petitioner's assertion. In the Preliminary Decision at page 23, footnote 16, the Board explains that because it rejected Grand Pier's central contention that it was not liable as an owner, the Board declined to reach the "Region's additional allegation, and Grand Pier's response, concerning Grand Pier's potential liability as an 'operator' under section 107(a)(1) and (2)." U.S. EPA, Region 5 urges, that the Final Decision reflect that Grand Pier in its original Petition had also denied that it was an operator of the off-site sidewalk area.

II. Clarification of Factual Background Description of the Lindsay Light Company's Ownership of Property

U.S. EPA, Region 5 in its Response to Grand Pier's Petition For Reimbursement filed in February 2005 (the "Region's Response") contained four pages presenting historical background and attached at least seven documents which reflected the relevant historical facts. The Region attempted to give comprehensive and accurate historical information. The Region's Response, at page 3, Section A. History of the Contamination, 2. Lindsay Light Manufacturing Operations in Streeterville, explains that the Lindsay Light Company manufactured gaslights and gaslight mantles at three different Streeterville locations. The accompanying footnote 4 observed these locations included 161 E. Grand and 316 E. Illinois Street. The Region's Response, at page 3, refers to Attachment 9 and also explains that "[d]uring Lindsay Light's operation, the 316 E. Illinois property was contiguous to the present-day Grand Pier parcel. Columbus Drive (also known as Fairbanks) was not extended through the 316 E. Illinois and Grand Pier properties until the 1980s." These statements were not intended to suggest that the Lindsay Light Company owned all of the property between 316 E. Illinois and the Grand Pier property. Rather, they were

intended only to reflect, as Attachment 9, page 11 stated, that “[f]or most of this [the 20th] century the study site was part of a very long east-west city block without cross streets. The Columbus Drive and McClurg Court extensions were only extended across the site during the last decade.” Note that the “study site” referenced in Attachment 9 is the 316 E. Illinois, River East site immediately east of the Columbus Drive extension. The Lindsay Light Company did not own the 316 E. Illinois Street property or the Grand Pier property. During the Lindsay Light Company’s operation, however, that “very long east-west city block” encompassed both the present-day Grand Pier property and the adjacent 316 E. Illinois property. The fact that the properties were contiguous during the Lindsay Light Company’s operations was of particular interest to U.S. EPA, Region 5 because of the likelihood that materials would have been transferred between the two operating Lindsay Light Company facilities across the present-day Grand Pier property. It also made more surprising the fact that Grand Pier’s environmental assessments did not include sampling for thorium.

The Board’s Preliminary Decision at page 10, I. Background, B. Factual Background, 1. Description of the Site, discusses the history of the ownership of the property at issue, i.e. the approximately 10’ wide by 46’ long by 8’ deep off-site sidewalk area for which Grand Pier sought reimbursement. Although the property at issue was not owned by the Lindsay Light Company, it is part of the facility (as defined by CERCLA) where Lindsay Light Company thorium wastes came to be located. The only property that the Lindsay Light Company owned was the Lindsay Light Building at 161 E. Grand. It should be clarified that the property at issue in this case is located in Chicago’s Streeterville neighborhood where the Lindsay Light Company operated from 1904 until the 1930’s and that the property at issue was once part of a long east-

west city block, bounded by Illinois on the south and Grand on the north. In the 1980s, almost 50 years after the Lindsay Light Company closed its Streeterville facilities, a north-south road, Columbus Drive (also known as Fairbanks) was extended across the long east-west city block. The second paragraph on page 10 of the Preliminary Decision should also be clarified to reflect that there are three properties located between Illinois and Grand Avenue which are relevant to this case. The easternmost property that housed Lindsay Light Company operations is 316 E. Illinois. Next, in the middle, is the Grand Pier property where Lindsay Light Company thorium wastes came to be located. Then at the western end, across St. Clair Street immediately west of the Grand Pier property, is the Lindsay Light Building at 161 E. Grand that also contained Lindsay Light Company operations.

Similarly, the Preliminary Decision, at page 11, refers to “many properties formerly owned by the Lindsay Light Company were contaminated with thorium radionuclides.” As explained above, of the three properties formerly operated by the Lindsay Light Company in Streeterville, only the 161 E. Grand Building was owned by the Lindsay Light Company. U.S. EPA has designated several Streeterville properties neither owned by nor operated upon by Lindsay Light Company, as part of Lindsay Light II, because they were contaminated with the Lindsay Light Company thorium wastes that were used for fill material.

The Preliminary Decision, at page 36, Part II. Discussion, A. The CERCLA Facility, once more refers to the Lindsay Light Company having “owned and operated the Grand Pier site and the off-site sidewalk areas and other surrounding areas as part of a single operation.” U.S. EPA, Region 5 regrets any statement contained in the Region’s Response or at oral argument that might have contributed to the misunderstanding regarding the Lindsay Light Company’s

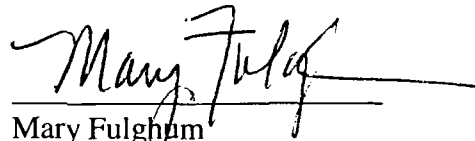
historical ownership of the property at issue or left the mis-impression the Lindsay Light Company's operations extended from 316 E. Illinois to 161 E. Grand. It is uncontested that wastes from the Lindsay Light Company's adjacent thorium processing facilities contaminated the Grand Pier-owned property and the property at issue. The Lindsay Light Company's thorium waste also contaminated several other properties adjacent to or in close proximity to 316 E. Illinois. As explained above, U.S. EPA, Region 5 treats all of these Streeterville properties where the Lindsay Light Company thorium contamination has come to be located as part of Lindsay Light II regardless of whether or not the Lindsay Light Company owned the properties.

The Preliminary Decision, at page 40, Part II Discussion, B. Grand Pier's "Owner" Argument and the Scope of CERCLA Liability, states "... the parties agree that Grand Pier holds legal title to the Grand Pier Site, but does not, under state law, hold legal or equitable title to the off-site sidewalk area." U.S. EPA, Region 5 cautions that Grand Pier, under state law, does not hold legal title to the approximately 10' wide by 46' long by 10' deep off-site sidewalk area but U.S. EPA, Region 5, would not concur that Grand Pier does not hold equitable title to any portion of the sidewalk right-of-way. For example, the caissons supporting Grand Pier's development encroach into the sidewalk right-of-way beyond the legal boundaries of Grand Pier's property. U.S. EPA, Region 5 does not believe the extent of Grand Pier's potential equitable title with respect to the sidewalk right-of-way has been fully examined.

U.S. EPA, Region 5 appreciates the Board's careful analysis of Grand Pier's Petition for Reimbursement, the Region's Response, supplemental briefs, oral argument presentations and responses to the Board's questions. U.S. EPA, Region 5 did not receive any comments from Petitioner regarding the Preliminary Decision. Consequently U.S. EPA, Region 5 comments are

limited to the Board's Preliminary Decision. U.S. EPA, Region 5 also appreciates the opportunity to offer comment on the Board's Preliminary Decision in this matter and respectfully requests that the Board incorporate U.S. EPA, Region 5's comments.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Mary Fulghum", with a horizontal line extending to the right.

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 5

Certificate of Service

I certify that ***RESPONDENT'S COMMENTS ON THE ENVIRONMENTAL APPEALS BOARD'S PRELIMINARY DECISION*** were filed in the following manner on the following date:

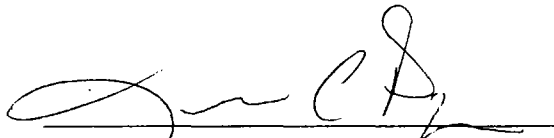
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Date



Leslie Payne, Section Secretary